1879) 5 Dill. 241, present the same confusion, holding that a trust is impressed on the special deposit, although the facts negative any intention to maintain a separate fund. See also *Cutler* v. *Am. Exch. Nat. Bank* (1889) 113 N. Y. 593 and *Drovers' Nat. Bank* v. *O'Hare* (1887) 119 Ill. 646. Where there is clearly an intention to have the funds kept separate special deposit constitutes a trust. *Peak* v. *Ellicott* (1883) 30 Kan. 156.

In the absence of a statute requiring the recording of chattel mortgages, a special preference might be found where mingling is authorized on the theory of an equitable lien or mortgage, if the Court could find an agreement to give such security. For equity will enforce such an agreement, both as regards assets owned by the equitable mortgagor at the time of the mortgage, *Donald & Co.* v. *Hewitt* (1859) 33 Ala. 534, and those acquired thereafter. *Tailby* v. *The Official Receiver* (1888) L. R. 13 App. Cas. 523. Such equitable lien is superior to the rights of general creditors. *Carter* v. *Holman* (1875) 60 Mo. 498. As equity, by the equitable mortgage, gives effect to the intention of the parties, an oral agreement would be as valid as a written agreement, the writing not under seal being no more efficient than mere words in effecting the conveyance of a legal estate. Pomeroy Eq., 3rd ed., § 1235. It might be difficult to satisfy the requirement of particular identification, *Adams* v. *Johnson* (1866) 41 Miss. 258 266, but an understanding that all the funds of the bank should be liable as security to the special depositor would seem sufficient. In most states, however, recording statutes have abrogated the equitable rule that prior in time is prior in equity. Pomeroy Eq. § 1291 n. 3. In such states the special depositor who authorizes a mingling could not be given a preference on any ground, there being no record of the mortgage.

CONSTITUTIONALITY OF A STATUTE RESTRICTING COMMON LAW REMEDY FOR LIBEL.—To overcome the effect of the troublesome common law fiction of implied malice in libel, 5 COLUMBIA LAW REVIEW 610, has been the object of not a little legislative action. 94 Ohio Laws, p. 295; Gen. Stat. Conn. § 1116; Rev. Laws Mass. (1902) p. 1564. The Ohio statute is worded as follows: "If it shall appear ....that the publisher, upon demand....published a full....retraction....the presumption of malice attaching to....the publication of said libelous matter shall be thereby rebutted." In a lately decided case the defendant published a retraction immediately following the libel. The plaintiff, however, claimed that the statute should not avail the defendant because no demand had been made for the retraction. The court sustained the plaintiff, holding that the statute in question, unless construed so as to give force to the words "upon demand," would deprive the defendant of his lawful remedy and so be unconstitutional as conflicting with the provision in the Ohio Constitution that "every person, for an injury done him in his.... reputation, shall have remedy by due course of law." *Post Pub. Co.* v. *Butler* (1905 C. C. A. Ohio) 137 Fed. 723.

The court reaches this conclusion by the following steps: (1) At common law the plaintiff had only to prove a publication actionable per se to recover general damages, since injury was necessarily presumed from the words themselves. (2) Under the statute, being com-

pelled, upon the publication of a retraction, to prove actual malice, the plaintiff is thereby restricted to the recovery of special damages, viz., for pecuniary loss. (3) The latter being in most cases impossible to prove, the statute virtually destroys the right to recover for a non pecuniary injury, and therefore is unconstitutional unless the words "on demand" be construed as mandatory.

The fundamental fallacy in this reasoning is the assumption that the statutory retraction, in rebutting the presumption of malice, necessarily precludes the plaintiff from general damages. But this involves the primary assumption that the source of general damages, *i. e.*, the presumption of injury arising from words actionable per se, is in some way dependent on the presumption of malice arising from the same words. On the contrary, since malice is not implied unless the words are actionable per se, and since words are not actionable per se unless they necessarily import injury, Odgers, Libel 3d ed., 1, 2, it would seem in the last analysis that the law will only presume malice where it will first find injury. *Chalmers* v. *Payne* (1835) 2 Cromp., M. & R. 155. Accordingly, although the statutory retraction may rebut the presumption of malice, it does not thereby destroy the presumption of injury, and thus it is erroneous to conclude that because the plaintiff must prove actual malice, he may no longer recover general damages. *Moore* v. *Stevenson* (1858) 27 Conn. 14; *Osborne* v. *Troup* (1891) 60 Conn. 485, 491. Therefore, unless a contrary intention may be deduced from the proviso clause of the act—thus illogically employing an extremely broad interpretation in order to reach a strict result—it may be presumed that the purpose of the legislature was merely to compel a plaintiff actually to prove malice where the common law had hitherto presumed it. *Hotchkiss* v. *Porter* (1862) 30 Conn. 414. Such a modification of the rules of evidence would seem clearly within the proper scope of legislative control. Cooley, Const. Lim. 525.

On this theory the statement of the court that "similar enactments in Michigan, Kansas, and North Carolina have been held unconstitutional" is not sustained by the cases cited. The statutes under consideration in *Park* v. *Free Press Co.* (1888) 72 Mich. 560, and in *Hanson* v. *Krehbiel* (1904) 68 Kan. 670, differ from the Ohio enactment in the vital respect that they each specifically limit the plaintiff to special damages. In the North Carolina case, *Osborne* v. *Leach* (1904) 135 N. C. 628, not only was the act in question different, but the court, far from declaring it unconstitutional, upheld its constitutionality. The court in the principal case alludes to *Allen* v. *Pioneer Press Co.* (1899) 40 Minn. 117, as having been "sustained seemingly because of the mandatory provision for a retraction." On the contrary, that case takes the extreme position that although, under the statute, the effect of a retraction, whether on demand or no is not specified, is to deprive the plaintiff of general damages, still this is not unconstitutional.

It is submitted that the reasoning in the principal case is unsound, but it is not contended that the court might not have properly reached the same result by holding that the enactment in question, being in derogation of the common law rules of evidence, must be construed strictly. Sedgwick, Stat. & Const. Law, 319. On this ground full force might well have been given to the exact wording of the statute.